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No. 75-456

In the Supreme Court of the United States

October Term, 1975

Sioux Nation of Indians, et al., petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The *en banc* opinion of the Court of Claims (Pet. App. A) is reported at 518 F. 2d 1298. The opinion of the Indian Claims Commission is reported at 33 Ind. Cl. Comm. 151, and is reproduced in part in Pet. App. B.

JURISDICTION

The judgment of the Court of Claims was entered on June 25, 1975. The petition for a writ of certiorari was filed on September 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether certain Sioux claims for interest arising under the Fifth Amendment are precluded as *res judicata* by an adverse 1942 Court of Claims judgment.

STATUTES INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. 70a, provides in part:

> The Commission shall hear and determine the following claims against the United States * * * (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; * * *.
>
> All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

Other pertinent statutes are reproduced at Pet. 4–5 and Pet. App. C.

STATEMENT

The historical facts are related in *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613, certiorari denied, 318 U.S. 789, and in the opinion of the Court of Claims in this case (Pet. App. A). They may be summarized as follows: In 1874 and 1875, after it became public knowledge that the Black Hills, owned by the Sioux, contained gold in paying quantities, a large number of prospectors and miners converged upon these lands to seek their fortunes (97 Ct. Cl. at 627–628). The United States initially attempted to

keep these trespassers out, but "it became practically impossible for the Government to expel the intruders or to prevent further intrusions into the Hills" (*id.* at 634). President Grant ordered federal forces to cease resisting or expelling the intruders, and the United States attempted to purchase the Black Hills from the Sioux. The negotiations were unsuccessful; the Sioux went to war. A disposition of the Black Hills was enacted by Congress as the Act of February 28, 1877, 19 Stat. 254 (*id.* at 629–633, 636–651). The transfer of the Black Hills to the United States by the Act of February 28, 1877, itself became a source of complaint among the Sioux, because less than ten percent of the adult male Indians had agreed to it, in violation of the provisions of Article 12 of the Treaty of April 29, 1868, 15 Stat. 635 (*id.* at 650; and see *Sioux Tribe of Indians* v. *United States,* 85 Ct. Cl. 181, 188).

On June 3, 1920, 41 Stat. 738, Congress enacted legislation permitting the Sioux to sue the United States on "all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States" and conferring jurisdiction on the Court of Claims "to hear and determine all legal and equitable claims, if any, of said tribe against the United States." The Sioux [1] argued to the Court of Claims that the 1877 Act "took" the Black Hills under the power of eminent domain, and that just compensation under the Fifth Amendment should be paid. In 1942 the Court of Claims dismissed the suit. *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613.

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[1] There are seven tribes of Sioux Indians. Only two, the Teton and Yanktonai Tribes, are principals here, for the Black Hills were within their historic territory. The other five Sioux Tribes (the Yankton, the Medawakanton, the Wahpeton, the Wahpakoota and the Sisseton) have other claims—some of which will doubtless produce large recoveries—pending before the Indian Claims Commission.

After the enactment of the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. 70 *et seq.,* the same groups of Sioux again filed a Fifth Amendment taking claim for the Black Hills. The Indian Claims Commission found that the fair market value of the Black Hills land, as of February 28, 1877, was $17.1 million. It concluded that the United States committed a Fifth Amendment taking on that date and was liable for that sum, together with five-percent interest from the date of the taking. The United States appealed solely on the question of interest. It admitted liability for the principal award as damages for unfair dealings—for which the statute allows no interest. The Court of Claims reversed the award of interest, finding the Sioux "taking" claim, for which interest would have been allowed, to be barred by the *res judicata* effect of the 1942 case. The court left standing the principal award of $17.1 million as damages for unfair dealings (Pet. App. A).

ARGUMENT

The dispute in this case is about the meaning of a 1942 opinion of the Court of Claims. According to petitioners (Pet. 12):

> The central question presented by [the] petition is whether the 1942 dismissal was on the ground that the 1920 Act so limited the court's jurisdiction as to preclude consideration of a Fifth Amendment taking case like the Black Hills claim, or whether, in 1942, the court assumed jurisdiction, adjudicated the claim on the merits and dismissed on the ground that there was no Fifth Amendment taking.

Petitioners contend that the former interpretation of the 1942 decision is correct; the Court of Claims accepted the latter interpretation. There is no reason for further review of that decision: The Court of Claims is best qualified to ascertain the meaning of its own opinions.

Petitioners do not contend that *res judicata* does not apply to Indian claims cases, nor could they, for this Court has held that prior adjudications—even adjudications under substantive law that has since changed—are binding in later Indian claims cases. *United States* v. *Southern Ute Tribe,* 402 U.S. 159. See also *United States* v. *Creek Nation,* 196 Ct. Cl. 639, certiorari denied, 406 U.S. 929; *Western and Eastern Cherokee Indians* v. *United States,* 89 F. Supp. 1006 (Ct. Cl.) certiorari denied, 340 U.S. 903. So long as *res judicata* continues to be available as a defense to claims brought under the Indian Claims Commission Act, cases like the instant one represent simply a problem of applying to the facts of a particular case the general principles laid down by this Court and the Court of Claims.

The Court of Claims' *en banc* interpretation of its own prior decision is well-considered and reasonable. Petitioners must therefore address their claims to

Congress, which has the power to remove the bar of *res judicata* and the power to authorize the Indian Claims Commission to award interest regardless of whether the damages are due to a "taking" (as petitioners contend, and for which interest is now authorized) or are attributable to unfair dealings and unconscionable conduct (as the Court of Claims held, and for which interest is not now authorized).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1975.

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[2] Last year Congress enacted Pub. L. 93–494, 88 Stat. 1499, which provided that offsets that might have reduced or eliminated the recovery of the Sioux in this case were to be disregarded.

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